



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Louisiana Foundation for Medical Care

**File:** B-225576

**Date:** April 29, 1987

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### DIGEST

1. Protester's best and final (BAFO) offer properly was rejected as being technically unacceptable where protester failed to rectify technical deficiencies brought to protester's attention prior to the date for submission of BAFO's.
2. Competitive advantage that an offeror may enjoy is not objectionable where it is not the result of a preference or unfair action by the government.
3. Allegation that a contract award was improper because a former agency employee subsequently was employed by awardee is denied where there is no evidence that the former employee exerted improper influence on behalf of the awardee or that the awardee received any improper consideration.
4. General Accounting Office will not conduct an independent investigation in connection with a bid protest in order to substantiate a protester's speculative allegations.
5. Under the Competition in Contracting Act of 1984, agencies are not required to provide to protesters and other interested parties documents related to a protest that would give one or more parties a competitive advantage or which the parties are not otherwise authorized by law to receive. Nevertheless, decisions on bid protests are based on the entire record and not merely on those portions that have been released to the protester and other interested parties.

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### DECISION

Louisiana Foundation for Medical Care (LFMC) protests the award of a contract to Louisiana Health Care Review (LHCR), under request for proposals (RFP) No. HCFA-86-054/BL, issued by the Health Care Financing Administration, Department of Health & Human Services (HHS). The awardee became the utilization and quality peer review organization (PRO) for the Medicare program in the state of Louisiana.

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We deny the protest in part and dismiss it in part.

The PRO is to monitor the professional activities of physicians and hospitals in Louisiana, as to reasonableness, medical necessity, and quality, with a view to enhancing the cost effectiveness of the Medicare program. This program implements the Peer Review Improvement Act of 1982 (part of the Tax Equity and Fiscal Responsibility Act of 1982), 42 U.S.C. § 1320c (1982).

The RFP solicited fixed price and technical proposals. The following proposal evaluation criteria are set forth in the RFP:

"TECHNICAL EVALUATION CRITERIA

- |   |            |
|---|------------|
| 1. Objectives and Data Activities                                   | 650 points |
| a. Specific objectives  |            |
| b. Other review activities and requirements                         |            |
| c. Data collection and analysis                                     |            |
| 2. Experience   | 200 points |
| a. Type and quality   |            |
| b. Private review   |            |
| 3. Personnel  | 200 points |
| a. Project Director   |            |
| b. Subcontractors   |            |
| c. Peer review  |            |
| 4. Management Plan  | 200 points |
| 5. Physician Sponsored Organization                                 | 100 points |
| 6. Understanding of Work  | 50 points  |
| a. Scope and purpose of PRO Act and prospective payment legislation |            |
| b. Scope and purpose of specific objectives                         |            |
| c. Scope and purpose of special review requirements                 |            |
| d. Scope and purpose of general review requirements                 |            |

"PRICE EVALUATION

Maximum of 400 points

"The business proposal will be evaluated as follows: Within the competitive range the

proposal of the lowest priced TECHNICALLY ACCEPTABLE offer will be given the maximum number of points (400). The calculation of points for the cost proposals of the other acceptable offers within the competitive range will be accomplished by the following method:

$$\text{"400 - (Price of acceptable proposal - Lowest priced acceptable proposal x 400) / Lowest priced acceptable proposal"}$$

The RFP advised offerors that paramount consideration would be given to the evaluation of the technical proposal rather than to cost or price.

LFMC and LHCR, two of the four firms which submitted proposals, were found to be within the competitive range. Their technical proposals, which received point ratings of 323.7 and 324, respectively, from a five-member technical review panel, were characterized as "unacceptable, but capable of being made acceptable."

After two rounds of discussions, the technical review panel concluded that the revised proposal of LHCR, with a technical score of 394.08, was acceptable and LFMC's revised proposal, with a technical score of 363.82, was unacceptable. A contract was awarded to LHCR in the fixed price amount of \$5,002,136.

LFMC protests that HHS improperly evaluated proposals. LFMC contends that its overall proposal is superior to the awardee's when an objective assessment is made of the organization, management team, statewide support, business proposal, review process, data system and potential for private review contracts. LFMC notes that it is a physician sponsored organization while the awardee is only a physician access organization, that its business proposal was highly regarded by the Office of Inspector General's (OIG's) auditors, that its bid price is \$100,000 less than the awardee's, and that unacceptable features of its proposal could have been resolved with minimal negotiation.

HHS responds that the technical review panel believed that LHCR showed a somewhat greater understanding of the Scope of Work requirements, while LFMC submitted a better management plan and appeared to have slightly more qualified personnel. In the area of experience, LFMC's proposal was considered slightly better. The panel found that the difference between LFMC and LHCR in any of the evaluation components was slight except in the area of physician sponsorship and objectives

and data activity. HHS reports that LFMC received 100 points as a physician sponsored organization while LHCR did not, and LHCR scored over 140 points higher in the area of objectives and data activity because of its superior objectives. According to HHS, unacceptable objectives were sufficient to make a proposal unacceptable, and LFMC had unacceptable objectives as well as a quality review plan which was not acceptable. Since LFMC's proposal was judged technically unacceptable, HHS believes its offered price is of no significance. HHS notes that the OIG's function is to determine if a prospective contractor's financial system is adequate and to make recommendations of allowable/unallowable costs, not to render an opinion as to the relative technical standing of proposals.

Our review of the record shows an error was made in the technical evaluation, but that LFMC's proposal was reasonably found to be unacceptable. The RFP provided that an offeror would receive 100 points if it were considered to be a physician sponsored organization. Yet, the record shows that during the technical evaluation of LFMC's best and final offer (BAFO), only two of the five evaluators' scores, which were averaged to compute a final total score, included the 100 points to which LFMC as a physician sponsored organization was automatically entitled. Thus, LFMC received only 40 points for its status as a physician sponsored organization rather than the 100 to which it was entitled. If all five scores had been adjusted, it appears LFMC would have had a higher technical score than LHCR.

LFMC was not prejudiced by this error, however, because its proposal was reasonably found to be unacceptable for its deficiencies in treatment of objectives, a major technical evaluation criterion. HHS identified for LFMC during discussions what it considered a major area of weakness in LFMC's initial proposal--its intervention plans and trigger points for objectives. HHS reports that trigger points are crucial to the formulation of good objectives, which are crucial to a PRO's success. (An intervention plan is a series of actions which the PRO will take once a provider's or practitioner's practice has been targeted for closer scrutiny. Trigger points are those actions which cause a provider or practitioner to warrant closer scrutiny.) According to HHS, if trigger points are set too high, providers with utilization or quality problems may not be identified, or conversely, if set too low, providers may inappropriately be selected for closer scrutiny.

HHS specifically advised LFMC in writing on two occasions that its proposal was "inadequate in the treatment of certain elements which we consider to be essential for successful

contract performance." A letter from HHS dated October 24, 1986, requesting a revised proposal, noted problems with all of LFMC's proposed objectives. A letter dated November 19, 1986, again requesting a revised proposal, noted that intervention plans or methodology for three objectives were unacceptable. Yet, HHS found LFMC's intervention strategy had not changed significantly in its BAFO.

LFMC comments that it based its approach on the Appropriateness Evaluation Protocol followed by the former PRO for southeast Louisiana, which resulted in savings for Medicare review. LFMC argues that HHS opted for an unrealistic search for the ideal as opposed to what could be realistically achieved by an actual management team.

These comments merely emphasize LFMC's disagreement with HHS's evaluation, but do not show the evaluation was unreasonable. It appears to us that HHS could rationally evaluate LFMC's proposal as unacceptable. The fact that the protester objects to the evaluation, and perhaps believes its own proposal was better than as evaluated by HHS, does not render the evaluation unreasonable. DALFI, Inc., B-224248, Jan. 7, 1987, 87-1 CPD ¶ \_\_\_\_. A proposal that has not been made technically acceptable after discussions properly may be rejected after BAFO's and the proposal may not be considered for award irrespective of the proposed price. See Par Steel Products Co., Inc., B-221966.2, May 30, 1986, 86-1 CPD ¶ 512. Moreover, since the agency properly found LFMC's proposal technically unacceptable, it did not have any obligation to conduct further negotiations with the firm. See Heuristic Developments, Inc., B-221292, Apr. 7, 1986, 86-1 CPD ¶ 338.

The fact that LFMC had a higher point score does not alter the above decision. The reason LFMC scored higher, as noted above, was because of the addition of the 100 points for being a physician sponsored organization. However, this does not impact on the technical merit of LFMC's proposal. In the area of objectives, LFMC received zero points because of its objectives being unacceptable while LHCR received between 80 and 90 points from the evaluators once its objectives became acceptable following discussions. Therefore, LFMC's higher point score does not change the fact that, after discussions and a final rescoring, LFMC's proposal was still considered technically unacceptable. LHCR was found to be at least minimally acceptable in all evaluation areas.

LFMC also protests that the awardee had unfair access to the data system of Louisiana's former PRO and thus had an unfair advantage in constructing organizational objectives. HHS responds that it has no knowledge that this allegation is true, and that it had no involvement in LHCR's access to data possessed by the former PRO.

For the purpose of our review of bid protests, a firm's competitive advantage is objectionable only when it is the result of a preference or unfair action on the part of the government. Alamo Technology, Inc., et al., B-221336, et al., Apr. 7, 1986, 86-1 CPD ¶ 340. Here, since LFMC has not shown that HHS engaged in any unfair action or conduct designed to give any firm a preference, LFMC's allegation does not provide a basis for us to object to a contract award under the RFP.

LFMC also protests that the awardee used a former HHS employee in its final, major rewrite of objectives. LFMC, however, has submitted no evidence tending to show that the former employee exerted improper influence on behalf of the awardee or that the awardee received any improper consideration, and we find no such evidence in the record. The incidence of a former government employee's subsequent employment with an awardee is not, alone, sufficient to establish that the award resulted from improper influence. Walker's Freight Line, B-220216.2, Jan. 15, 1986, 86-1 CPD ¶ 45. Consequently, we deny this basis of protest.

LFMC also contends that the awardee's representations and certifications regarding independent price determinations and contingent fee representations are questionable and should be investigated. However, LFMC presented no evidence in its protest in support of its allegation. We will not conduct investigations for the purpose of establishing the validity of a protester's speculative statements. The Big Picture Co., Inc., B-220859.4, May 22, 1986, 86-1 CPD ¶ 477.

LFMC also protests that the awardee used federal contract funds to finance its proposal. Specifically, LFMC states that the awardee used the postage meter of the former PRO, Louisiana Medical Review Foundation (LMRF), in its mail recruitment of physician members, that a member of the awardee's staff was paid for proposal work with LMRF funds to be used in phasing out operations, and that the awardee used LMRF space, equipment, furniture, and supplies in preparing its PRO application.

HHS responds that LFMC misunderstands the difference between federal funds and contractor revenues under government contracts. Since the PRO contract with LMRF was a fixed-price contract, HHS argues that the government had no right to dictate how funds paid under the contract were spent. We agree.

LFMC also alleges that, following award of the PRO contract, HHS informed the awardee that it would "let slide" some of the established dates on the RFP's schedule of deliverables. This issue is also not for resolution under our Bid Protest Regulations, 4 C.F.R. § 21.3f(1). Whether a contractor

actually performs in accordance with the solicitation's requirements is a matter of contract administration that is the responsibility of the contracting agency. McAllister Brothers, Inc., B-223888, Aug. 27, 1986, 86-2 CPD ¶ 235.

LFMC also objects to HHS's failure to provide LFMC with copies of all documents which HHS has relied upon in its responses to the General Accounting Office. Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. III 1985), government agencies are not required to provide to protesters and other interested parties documents related to a protested procurement action that would give one or more parties a competitive advantage or which the parties are not otherwise authorized by law to receive. Nevertheless, consistent with our practice, we have reviewed and base our decision on the entire record, not merely those portions that have been provided to the protester. Newport News Shipbuilding and Dry Dock Co., B-221888, July 2, 1986, 86-2 CPD ¶ 23.

The protest is denied in part and dismissed in part.

*Harry R. Van Cleve*  
Harry R. Van Cleve  
General Counsel